1868, art. XIV, § 2 (App. 190a). Petitioners presented what the district court characterized as "an abundance of expert testimony about the historical background of Florida's felon disenfranchisement scheme," including "that the policy was enacted originally in 1868 with the particular discriminatory purpose of keeping blacks from voting." *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338-39 (S.D. Fla. 2002) (App. 159a); *see, e.g.*, Expert Report of Jerrell H. Shofner, Ph.D. ("Shofner Rep.") (App. 197a). The en banc court of appeals assumed an original discriminatory purpose, acceding to the requirement that it read the record in the light most favorable to petitioners before affirming summary judgment against them. *Johnson v. Bush*, 405 F.3d 1214, 1223 (11th Cir. 2005) (en banc) (App. 18a).

In 1968, faced with an upsurge in black political participation triggered by Congress's adoption of the VRA in 1965, Florida reenacted its permanent felony disenfranchisement provision, even though the policy had disenfranchised blacks at twice the rate of others throughout its hundred-year history. Deposition of Lance deHaven Smith at 173, 181-83 ("deHaven Smith Dep."); Expert Report of Christopher Uggen, Ph.D. ("Uggen Rep."), at 3, 22 (App. 259a-60a, 296a-97a); Christopher Uggen, Addendum, Florida Disenfranchised Felon and Ex-Felon Populations (Best Estimates for 1967 and 1968) ("Uggen Add.") (App. 301a-02a). Florida did not articulate a reason for continuing to disenfranchise first-time offenders for life. This policy is now shared by only three other states: Alabama, Kentucky, and Virginia. The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2005), *at* http://www.sentencingproject.org/pdfs/1046.pdf.[2]

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[2] The Sentencing Project lists Iowa as an additional permanent disenfranchisement state but notes that the Governor recently issued an executive order restoring voting rights to all people in the state who have completed their criminal sentences. *Id.*

Florida's permanent felony disenfranchisement provision remains in force today. Its application to those who have completed their sentences denies the franchise to 5.2% of Florida's total voting-age population. Uggen Rep. at 1, 22 (App. 256a, 296a-97a). One of the starkest consequences of the provision is its disproportionate disenfranchisement of African-Americans, effectuating the State's 1868 intent. Excluding those who are still serving felony sentences, the law disenfranchises 10.5% of voting-age African-Americans (approximately 167,000 men and women), as compared to 4.4% of the non-African-American voting-age population. *Id.*

STATEMENT OF THE CASE

By the close of discovery, petitioners had produced expert evidence that four provisions of the 1868 constitution relevant to the franchise were "intentionally racially discriminatory." Shofner Rep. at 2 (App. 199a). These provisions apportioned representation so as to dilute black political power; gave the governor the power to appoint most local officials, thereby depriving majority-black localities of the power to elect their leaders; enfranchised ex-Confederates; and disenfranchised people with felony convictions. The "Radical" Republicans, whose primary goal was to empower newly freed slaves, opposed all four provisions, but an alliance of "Moderate" Republicans and ex-Confederates excluded the "Radicals" from the 1868 Constitutional Convention. *Id.* Some of the authors of the 1868 constitution later boasted that they had helped "prevent a negro legislature," *id.* at 16 (App. 224a), and had kept Florida from being "niggerized," Jerrell H. Shofner, *The Constitution of 1868*, Florida Hist. Q., Apr. 1963, at 374 (App. 305a). More such evidence might exist today had the members of the 1868 Convention not voted to purge the official record. J. Proc. Const. Convention St. Fla., Feb. 20, 1868, at 48-49 (App. 306a-08a).

With regard to the 1968 reenactment of the felony disenfranchisement provision, Florida adopted a policy of silence, creating no official record of the reasoning underlying the decision to perpetuate permanent felony disenfranchisement. Thus, the parties in this case stipulated that "[t]here is no evidence in the R.H. Gray state archives [Florida's primary archival depository] showing that any[one] . . . associated with the 1968 constitutional revision process ever considered the racial implications or consequences of the felon disenfranchisement provision." Joint Pretrial Stipulation of the Parties at 22. Of course, there is also no evidence in the current record that the decision to reenact was untainted by the State's racial motives.[3] The district court admitted only one document related to the 1968 reenactment – the minutes of the Suffrage and Elections Committee Meeting of February 2 and 3, 1966, offered by the State. Neither this document nor any other in the record nor any improperly excluded document reveals a legitimate reason for the legislature's decision in 1968 to continue to disenfranchise people with felony convictions for life.

The discriminatory impact of the 1868 provision has persisted for over a century, disenfranchising blacks at far higher rates than others. At the end of the nineteenth century, approximately 48% of Florida's general population was of African descent, deHaven Smith Dep. at 173, while at least 82% of Florida's prison population was African-American, *id.* at 180-83. From the 1968 revision to the present, African-Americans have been disenfranchised because of felony convictions at more than twice the rate of

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[3] The district court improperly excluded petitioners' expert report on the history of the 1968 reenactment, 4/18/02 Order Granting Mot. to Exclude Expert Richard Scher (App. 179a-85a), excluded the archival documents that informed the report, 5/30/02 Order Denying Pls.' Mot. to Supplement Record (App. 171a-72a), and then relied on portions of the excluded report in its summary judgment decision, *Johnson*, 214 F. Supp. 2d at 1339 (App. 160a-61a).

others. Uggen Rep. at 3, 22 (App. 259a-60a, 296a-97a); Uggen Add. (App. 301a-02a).

This disproportionate disenfranchisement is not simply the result of higher crime rates in the black community. Petitioners introduced evidence that Florida used its criminal justice system to subjugate black citizens from the early days of emancipation until well into the twentieth century. The Black Codes of the late 1860s defined a host of crimes – including assault on a white female, vagrancy, and larceny (amended to include the taking of cotton, corn, and other agricultural products) – in a manner that targeted ex-slaves. Shofner Rep. at 6-7 (App. 206a-08a). Conviction of these and other "infamous crimes" resulted in disenfranchisement under the 1868 constitution. *Id.* at 18-19 (App. 229a-30a).

More than a century later, blacks were still systematically excluded from criminal juries, *see, e.g., Spencer v. State*, 545 So. 2d 1352, 1354-55 (Fla. 1989), and the use of peremptory challenges to exclude blacks from juries continued longer still, *see, e.g., Brown v. State*, 733 So. 2d 1128, 1129-30 (Fla. Dist. Ct. App. 1999); *Foster v. State*, 732 So. 2d 22, 23-24 (Fla. Dist. Ct. App. 1999). Thousands of members of the plaintiff class were convicted during the 1960s and 1970s when these practices were commonplace.

And still today in Florida, African-Americans are convicted of felonies at a rate far higher than can be explained by their relative participation in crime. Among those who commit crimes, blacks are disproportionately likely to be arrested and, once arrested, they are disproportionately likely to be convicted. Indeed, at least 25-36% of the racial disparity in felony convictions cannot be attributed to differential involvement in criminal activity. Expert Report of Theodore Chiricos, Ph.D. ("Chiricos Rep."), at 7-13, 18-20 & tbls. 2, 3, 4, 9 (App. 320a-27a, 332a-35a, 356a-60a). The discretionary clemency process exacerbates these racial disparities because the rights-restoration rate is significantly lower for African-American

applicants than for others. Uggen Rep. at 5-11 (App. 263a-70a); Supplement to Uggen Rep. at 1-8 ("Uggen Supp.") (App. 361a-73a).[4]

Based on this evidence, petitioners cross-moved for summary judgment on January 18, 2002; the State had moved for summary judgment two weeks earlier. The district court granted the State's summary judgment motion on all claims on July 18, 2002. *Johnson*, 214 F. Supp. 2d 1333 (App. 150a). Petitioners appealed to the Court of Appeals for the Eleventh Circuit.

On December 19, 2003, a divided panel of the Eleventh Circuit reversed the district court's grant of summary judgment. *Johnson v. Bush*, 353 F.3d 1287 (11th Cir. 2003) (App. 86a). With regard to the claim under Section 2 of the VRA, the court ruled that the district court had failed both to apply the proper standard and to consider the relevant evidence under the totality of circumstances test. *Id.* at 1303-06 & n.25 (App. 112a-21a & n.25). Viewing the evidence in the light most favorable to petitioners, the court found genuine issues of material fact and remanded for trial on a full evidentiary record. *Id.* at 1306 (App. 118a-20a). The majority also concluded that petitioners' extensive evidence of the discriminatory intent behind Florida's 1868 felony disenfranchisement provision had created a genuine issue of fact sufficient to withstand summary judgment on their

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[4] Petitioners' additional evidence of racial bias in Florida's criminal justice system – five reports of the Florida Supreme Court's Racial and Ethnic Bias Study Commission and expert testimony concerning the tendency of Florida's discretionary law enforcement practices to target African-American communities – was erroneously excluded by the district court as untimely based on an ambiguous order. 4/4/02 Order Granting in Part Mot. to Exclude Out-of-Time Evidence (App. 183a-85a). The district court also erroneously excluded as irrelevant an expert report detailing racially polarized voting patterns and analyzing their interaction with Florida's felony disenfranchisement policy. 4/18/02 Order Granting in Part Mot. to Exclude Expert Richard Engstrom (App. 173a-78a).

Fourteenth and Fifteenth Amendment claims. *Id.* at 1295-96 (App. 94a-97a). The burden then shifted to the State either to rebut that showing or to prove that the provision was "subsequently reenacted on the basis of an independent, non-discriminatory purpose." *Id.* at 1301 (App. 106a-07a). The court remanded for further discovery and trial of these claims. *Id.* at 1302 & n.19 (App. 110a-11a & n.19).

On July 20, 2004, the Eleventh Circuit vacated the panel's decision and ordered rehearing en banc. *Johnson v. Bush*, 377 F.3d 1163 (11th Cir. 2004) (en banc) (App. 85a). On April 12, 2005, the en banc court of appeals affirmed the district court's grant of summary judgment to the State. *Johnson*, 405 F.3d 1214 (App. 1a). Explicitly acknowledging that "[t]he Circuits are split on this issue," *id.* at 1227 (App. 25a), the majority held that Section 2 of the VRA has no application to felony disenfranchisement, *id.* at 1234 (App. 43a). The court reasoned, based on this Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), that the Penalty Clause in Section 2 of the Fourteenth Amendment guarantees "Florida's discretion to deny the vote to convicted felons," *Johnson*, 405 F.3d at 1228-29 (App. 29a-30a). "[I]nterpreting Section 2 of the Voting Rights Act to deny Florida the discretion to disenfranchise felons" would therefore "allow[ ] a congressional statute to override the text of the Constitution." *Id.* at 1229 (App. 30a). To avoid what it perceived as the consequent "grave constitutional concerns," *id.* at 1234 (App. 43a), the court read felony disenfranchisement out of the otherwise comprehensive "voting qualification[s] or prerequisite[s] to voting" covered by Section 2 of the VRA, 42 U.S.C. § 1973(a). Having held the VRA inapposite, the court did not determine the sufficiency of petitioners' evidence of the totality of the circumstances in which Florida's felony disenfranchisement law interacts with racial bias in the criminal justice system and the lingering effects of other racial exclusion to result in the disproportionate disenfranchisement of African-

Americans. *But cf. Johnson*, 405 F.3d at 1230 n.31 (discounting, in dicta, evidence submitted by petitioners).

As to the constitutional claims, the court of appeals "assume[d], without deciding, that racial animus motivated the adoption of Florida's 1868 disenfranchisement law." *Johnson*, 405 F.3d at 1223 (App. 18a). Focusing instead on Florida's 1968 reenactment of the provision, the majority emphasized two facts: first, the mere existence of a four-stage revision process; and second, the elimination of a distinct but largely redundant provision of the Florida Constitution that specified crimes triggering disenfranchisement, including certain misdemeanors. *Id.* at 1220-22 (App. 11a-15a) (citing Fla. Const. of 1868, art. VI, § 5 (1885)). Although both before and after the 1968 reenactment the Florida Constitution disenfranchised people with felony convictions unless and until they received clemency, the court of appeals deemed the 1968 reenactment a substantive alteration.[5] *Id.* The court then concluded that this reenactment, made without explanation of its purpose, eliminated the taint from the discriminatory 1868 provision. *Id.* at 1224 (App. 20a-21a). The Eleventh Circuit rejected petitioners' argument that under this Court's holding in *United States v. Fordice*, 505 U.S. 717 (1992), Florida has the burden of establishing a decisive break with the discriminatory origins of its felony disenfranchisement law. *Johnson*, 405 F.3d at 1225-26 (App. 22a-25a).

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[5] The 1868 provision read, in relevant part: "[N]or shall any person convicted of felony be qualified to vote at any election unless restored to civil rights." Fla. Const. of 1868, art. XIV, § 2 (App. 190a). The 1968 provision reads, in relevant part: "No person convicted of a felony . . . shall be qualified to vote . . . until restoration of civil rights . . . ." Fla. Const. art. VI, § 4 (1968) (App. 192a).

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for two reasons. First, the Court should resolve the split between the Eleventh and Ninth Circuits on the question whether Section 2 of the VRA applies to felony disenfranchisement laws. The answer to this question will determine what redress is available to the hundreds of thousands of minority citizens who now have no say in who governs them. Second, the lower courts are in disarray regarding the evidentiary rules to be followed in the many cases that involve an inquiry into improper governmental purpose. The Court should make explicit its consistent approach: that the state bears the evidentiary burdens of production and persuasion, and must present evidence sufficient to prove that legitimate reasons for a reenactment cure a policy tainted by an original discriminatory purpose.

I. The Court Should Grant the Petition to Resolve the Split in the Circuits on Whether Section 2 of the VRA May Be Applied to Felony Disenfranchisement Laws.

This case squarely presents the important threshold issue of whether felony disenfranchisement laws are actionable under Section 2 of the VRA. Section 2 prohibits "voting qualification[s] or prerequisite[s] to voting" that result in a denial of the right to vote on account of race. 42 U.S.C. § 1973(a). No court has ever placed any voting qualification other than a felony disenfranchisement provision beyond the reach of Section 2. The question of coverage turns on the language of the statute and, in light of the Eleventh Circuit's holding, Congress's enforcement power under the Reconstruction Amendments.

A. The Circuits Are Split on the Question Whether Felony Disenfranchisement Laws Are Subject to Challenge Under Section 2 of the VRA.

In holding that Florida's felony disenfranchisement law is not subject to challenge under Section 2, the Eleventh Circuit acknowledged that "[t]he Circuits are split on this issue." *Johnson*, 405 F.3d at 1227 (App. 25a); *see also Muntaqim v. Coombe*, 366 F.3d 102, 104 (2d Cir.) ("[W]e recognize that this is a difficult question that can ultimately be resolved only by a determination of the United States Supreme Court . . . ."), *cert. denied*, 125 S. Ct. 480, *and reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004); *Farrakhan v. Washington*, 359 F.3d 1116, 1126-27 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc).

There is a direct conflict between the Ninth and the Eleventh Circuits. The Ninth Circuit, in a straightforward application of the text of the statute, held that a claim of vote denial is cognizable under Section 2 of the VRA because felony disenfranchisement is plainly a "voting qualification" within the ordinary meaning of the statutory term. *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003), *cert. denied sub nom. Locke v. Farrakhan*, 125 S. Ct. 477 (2004). Thus, whether a particular state's felony disenfranchisement law creates racial inequality in voting is to be determined based on the merits of the individual case. *Id.* at 1016-17. In contrast, in the case before this Court, the Eleventh Circuit did not focus on the text of Section 2, but rather reasoned that without a clear congressional statement of specific intent, the Penalty Clause of the Fourteenth Amendment places felony disenfranchisement laws, unlike all other voting qualifications, beyond the reach of Congress's power to redress race discrimination in voting. *See Johnson*, 405 F.3d at 1228-34 (App. 29a-43a).

Like the Ninth Circuit, the Fourth and Sixth Circuits have allowed challenges to state felony disenfranchisement laws to proceed under Section 2, and these courts did not even question whether such laws are covered by the VRA.

Howard v. Gilmore, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000) (unpublished) (App. 193a-96a) (dismissing claim for failure to plead that there was "any nexus between the disenfranchisement of felons and race");[6] *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (assuming the applicability of Section 2 to a felony disenfranchisement statute, but concluding that "in the context of the 'totality of the circumstances,' it is apparent that the challenged legislation does not violate the Voting Rights Act").

In addition, the Second Circuit has twice considered the issue without arriving at a binding conclusion. First, sitting en banc in *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996), the court divided equally on the question. *Id.* at 921-22, 934, 940. More recently, in *Muntaqim*, a panel held that Section 2 of the VRA did not apply to New York's felony disenfranchisement statute. 366 F.3d at 104. After this Court denied certiorari, 125 S. Ct. 480 (2004), the Second Circuit sua sponte granted en banc review of the panel decision, 396 F.3d 95 (2d Cir. 2004), and heard arguments on June 22, 2005.

The circuit courts' conflicting approaches create inconsistent levels of federal protection for the voting rights of racial minorities. Geography now determines whether criminal disenfranchisement laws, including permanent bans on voting by anyone convicted of a felony, may be challenged under the VRA. Of the four states that permanently disenfranchise all citizens convicted of felonies, two – Virginia and Kentucky – lie in circuits that treat Section 2 challenges to those laws as cognizable. *See Howard*, 2000 WL 203984 (App. 193a); *Wesley*, 791 F.2d 1255. But the Eleventh Circuit ruling below cuts off redress

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[6] The Fourth Circuit permits citation to unpublished opinions if "there is no published opinion that would serve as well . . . ." 4th Cir. R. 36(c).

under Section 2 of the VRA for the 613,000 Florida petitioners in this case, and the more than 148,000 citizens of Alabama, who have completed their sentences but remain barred indefinitely from the polls. Marc Mauer & Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States* 6 tbl. (2005), *at* http://www.sentencingproject.org/pdfs/barredforlife.pdf.

B. The Decision Below Rests on a Fundamental Misreading of the Constitution That Calls for this Court's Correction.

Though couched in terms of statutory interpretation, the Eleventh Circuit's refusal to apply Section 2 of the VRA to felony disenfranchisement laws rests on that court's judgment that such an application would potentially violate the Constitution. The en banc majority reasoned that applying Section 2 to Florida's law would create "a serious constitutional question by interpreting the Voting Rights Act to conflict with the text of the Fourteenth Amendment." *Johnson*, 405 F.3d at 1230 (App. 32a).

The Eleventh Circuit's conclusion that felony disenfranchisement is immune from challenge under Section 2 because it is expressly protected by the Constitution, *id.* at 1228-30 (App. 29a-34a), overstates this Court's reasoning in *Richardson v. Ramirez*, 418 U.S. 24 (1974), ignores the holding in *Hunter v. Underwood*, 471 U.S. 222 (1985), and allows the exemption of criminal disenfranchisement from the Penalty Clause of the Fourteenth Amendment to trump the Fifteenth Amendment's subsequently enacted and unqualified ban on race discrimination in voting.

In the Penalty Clause of the Fourteenth Amendment, the Reconstruction Congress recognized that former Confederate states might deny voting rights to freedmen and created a broad, structural penalty for such disenfranchisement. The Clause also created a limited exception to that penalty:

> [W]hen the right to vote . . . is denied to any of the male inhabitants of such State . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation [in Congress] shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, § 2 (emphasis added).

In *Richardson*, this Court relied on the Penalty Clause's exemption of criminal disenfranchisement from the sanction of reduced representation in Congress to reject a nonracial, equal protection challenge to provisions of the California Constitution that permanently disenfranchised certain felons. 418 U.S. at 42-43. The Court reasoned that the framers of the Fourteenth Amendment "could not have intended to prohibit outright in [the Equal Protection Clause of] § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment." *Id.* at 43; *see also id.* at 55.

Yet when this Court faced a challenge to criminal disenfranchisement on the grounds that the provision was enacted in order to disqualify blacks from voting, it found the Penalty Clause exemption inapposite. *Hunter*, 471 U.S. at 233. In *Hunter*, the Court struck down Alabama's criminal disenfranchisement law, observing that the "implicit authorization of § 2 [of the Fourteenth Amendment] . . . was not designed to permit the purposeful racial discrimination attending the enactment and operation of [a law] which otherwise violates § 1 of the Fourteenth Amendment," and noting that nothing in *Richardson* is to the contrary. *Id.* Thus, *Hunter* stands for the proposition that criminal disenfranchisement laws do violate the Constitution when

enacted with the intent to deprive one racial group of its fundamental right to participate in the political process. *Id.*

Under *Hunter* and *Richardson*, then, felony disenfranchisement laws are not *per se* unconstitutional, but they are unconstitutional if they deliberately abridge the right to vote on account of race. *See Richardson*, 418 U.S. at 55; *Hunter*, 471 U.S. at 231-33. This interpretation is mirrored in Congress's exercise of its enforcement power through the VRA: felony disenfranchisement laws are not prohibited *per se* in Section 4 of the VRA, but may be evaluated on a case-by-case basis for their discriminatory effects under Section 2. *See* 42 U.S.C. §§ 1973, 1973b; *see also Johnson*, 405 F.3d at 1249 (Barkett, J., dissenting) (App. 78a) (criticizing the en banc majority for "overlook[ing] the distinction between felon disenfranchisement laws generally and the narrow subset of such laws that result in racial discrimination").

In addition to *Hunter*'s express recognition of a Fourteenth Amendment right to be free from racially discriminatory criminal disenfranchisement, the text, logic, and history of the Fifteenth Amendment undercut the Eleventh Circuit's approach. The Fifteenth Amendment makes no exception for criminal disenfranchisement. When disenfranchisement is intentionally racially discriminatory, the Fifteenth Amendment supersedes the earlier adopted Penalty Clause – replacing its structural penalty with an outright prohibition. There is thus no logical reason to assume that the Penalty Clause's race-neutral exemption from its general penalty was implicitly imported into the Fifteenth Amendment's prohibition against discrimination in voting based on race. Indeed, in crafting the Fifteenth Amendment, the Reconstruction Congress repeatedly considered exempting criminal disenfranchisement laws from the general ban on race discrimination in voting and rejected every such exception. *See, e.g.*, 67 H.R.J. 232-37 (1869); Cong. Globe, 40th Cong., 3d Sess. 724 (1869). The Eleventh

Circuit would nevertheless allow the exemption within the Fourteenth Amendment's Penalty Clause to immunize felony disenfranchisement laws from congressional enforcement of the Fifteenth Amendment's subsequent, specific, and exceptionless ban on race discrimination in voting.

Once it is clear – as it is from *Hunter* and an analysis of the text and history of the Fifteenth Amendment – that there is a constitutional right to be free of racially discriminatory felony disenfranchisement, nothing supports any special limit on Congress's remedial power. Congressional power under the enforcement clauses of the Reconstruction Amendments is strongest when protecting fundamental rights, *see, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 518 & n.4, 532 n.20 (2004), and when providing injunctive protection against state practices subject to heightened judicial scrutiny under the Equal Protection Clause, *see, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736, 738 (2003). Enforcement of the Fifteenth Amendment implicates both the most fundamental of all democratic rights – voting – and the paradigmatic "suspect class" – race. Unsurprisingly, then, Congress's enforcement power was at its zenith in enacting the VRA. *See Lane*, 541 U.S. at 518 n.4; *Hibbs*, 538 U.S. at 737-38; *Lopez v. Monterey County*, 525 U.S. 266, 282-85 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

The Eleventh Circuit majority stopped short of holding that Congress lacked the power to reach Florida's felony disenfranchisement law under Section 2 of the VRA. The court held instead that the "grave constitutional questions" raised by such an application compelled it to invoke the doctrine of constitutional avoidance. *Johnson*, 405 F.3d at 1229 (App. 32a). Because that doctrine depends on locating ambiguity in the statute, *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998), the court sought and found ambiguity in the statutory phrase "on account of race or color," *Johnson*, 405 F.3d at 1229 n.30 (App. 31a-32a n.30). But

any uncertainty under subsection (a) about whether a particular voting qualification results in discrimination "on account of race or color" is resolved by subsection (b), which specifies that "[a] violation of subsection (a) . . . is established" by the totality of circumstances test, which is further illuminated in the accompanying Senate Report. 42 U.S.C. §§ 1973(a), (b); S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 *et seq.*; *Thornburg v. Gingles*, 478 U.S. 30, 43-45 (1986) (treating the Senate Report as controlling the analysis). The only remaining question then is how Florida's provision fares under the VRA's totality of the circumstances test, 42 U.S.C. § 1973(b), which is a factual determination for trial.

Similarly, the en banc court misapplied the clear statement rule. Although this rule also operates only when a statute is ambiguous, *Yeskey*, 524 U.S. at 209-12, which Section 2 of the VRA is not,[7] the Eleventh Circuit required "a clear statement from Congress that it intended [the] constitutionally-questionable result" of covering felony disenfranchisement, *Johnson*, 405 F.3d at 1232 (App. 37a-38a). Finding no clear statement, the court refused to apply Section 2 of the VRA to the Florida provision. *Id.* (App. 38a). By this logic, a VRA challenge would be barred even when a state had habitually violated the Constitution by using its felony disenfranchisement laws to discriminate intentionally against black voters.

In contrast to the Eleventh Circuit's convoluted constitutional analysis, the Ninth Circuit reasoned in a straightforward way, without resort to invented ambiguity. The court first observed that felony disenfranchisement laws are "voting qualification[s]" within the ambit of the Act's

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[7] *See Chisom v. Roemer*, 501 U.S. 380, 412 (1991) (Scalia, J., dissenting) ("[W]e tacitly rejected a 'plain statement' rule as applied to the unamended [VRA] § 2 in *City of Rome* . . . .").

ban on any "voting qualification . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race," 42 U.S.C. § 1973(a). *Farrakhan*, 338 F.3d at 1016. Because "Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA," *id.*, the Ninth Circuit reasoned that the plaintiffs' claim of vote denial was cognizable. The court saw no constitutional reason to look beyond the plain meaning of the statute or to create special exemptions for felony disenfranchisement. The Ninth Circuit recognized what this Court made clear in *Hunter*: "[S]tates cannot use felon disenfranchisement as a tool to discriminate on the basis of race." *Id.* (citing *Hunter*, 471 U.S. at 233). Regarding Congress's intentions, the court pointed to the breadth of Section 2's coverage, noting that "Congress specifically amended the VRA to ensure that, 'in the context of all the circumstances in the jurisdiction in question,' any disparate racial impact of facially neutral voting requirements did not result from racial discrimination." *Id.* (quoting the Senate Report and citing *Chisom*, 501 U.S. at 394 & n.21); *cf. In re England*, 375 F.3d 1169, 1179 (D.C. Cir. 2004) (acknowledging that the Supreme Court has repeatedly instructed that statutes written in broad language should be given broad application) (citations omitted), *cert. denied sub nom. Chaplaincy of Full Gospel Churches v. England*, 125 S. Ct. 1343 (2005).

Thus the Ninth Circuit expressly, and the Fourth and Sixth Circuits by implication, treat challenges to felony disenfranchisement laws under Section 2 of the VRA as they would challenges to any other voting qualification. Rather than requiring heightened evidence of legislative intent, they evaluate whether plaintiffs have properly alleged and can prove that in "the totality of circumstances," a challenged provision creates inequality in different racial groups' opportunities "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

C. This Case Is a Good Vehicle for Resolving the Question Presented.

This case comes to the Court on summary judgment with a factual record that includes strong evidence of the objective factors specified by the Senate as relevant to liability under Section 2 of the VRA.[8] The strong Senate-factor evidence is relevant to the question presented because Congress could not have intended to omit coverage of a voting qualification that interacts so strongly with the very factors Congress identified as typically creating Section 2 violations.

In this case, the record is so strong on the first Senate factor – historical discrimination in voting – and so weak on the last factor – the State's reasons for maintaining the policy – that petitioners have an independent claim of intentional race discrimination under the Fourteenth and Fifteenth Amendments. *See infra* Part II. In addition, petitioners presented evidence that the discriminatory impact of

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[8] The Senate Report that accompanied the 1982 amendments to Section 2 sets out a non-exhaustive list of factors relevant to a claim: "the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . . ; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 44-45 (citing S. Rep. No. 97-417, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07). The Report also notes the probative value of evidence demonstrating that elected officials are unresponsive to the particular needs of the minority group and that the State has only tenuous reasons for maintaining the challenged policy. S. Rep. No. 97-417, at 29, *reprinted in* 1982 U.S.C.C.A.N. at 207.

Florida's felony disenfranchisement provision results in part from discrimination in another area – the criminal justice system, where racial disparities in felony convictions cannot be explained by higher rates of crime in the black community. *See* Chiricos Rep. (App. 310a). These disparities are aggravated by voting practices and procedures that tend to enhance the opportunity for racial discrimination. For example, the clemency process aggravates racial disparities by restoring voting rights to whites at higher rates than to blacks. *See* Uggen Rep. at 5-11 (App. 263a-70a); Uggen Supp. at 1-8 (App. 361a-73a). The process for purging the voter lists in 1998-2000 further aggravated these disparities. *See* Fla. Stat. ch. 98.0975 (repealed 2001); U.S. Comm'n on Civil Rights, Voting Irregularities in Florida During the 2000 Presidential Election, ch. 5 (2001), *available at* http://www.usccr.gov/pubs/vote2000/report/main.htm. In addition, elections in Florida are characterized by racially polarized voting, Uggen Rep. at 11-12,[9] and only rarely result in the election of black candidates, David A. Bositis, *Black Elected Officials: A Statistical Summary 2001*, at 16 tbl.3 (Joint Ctr. for Political & Econ. Studies 2003), *available at* http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf. *See Gingles*, 478 U.S. at 44-45.

Taking the evidence in the light most favorable to petitioners, as is required on summary judgment, Florida's felony disenfranchisement law is a voting qualification originally adopted as part of a multi-faceted scheme to disenfranchise African-Americans in a state whose history is replete with official race discrimination. The challenged provision continues to defeat black Floridians' electoral preferences today by disenfranchising them at twice the rate

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[9] *See also Solomon v. Liberty County*, 899 F.2d 1012, 1020-21 (11th Cir. 1990) (equally divided court) (Kravitch, J., concurring); *id.* at 1037 (equally divided court) (Tjoflat, C.J., concurring); *NAACP v. Gadsden County Sch. Bd.*, 691 F.2d 978, 982-83 (11th Cir. 1982).

of the rest of Florida's electorate. Uggen Rep. at 1, 22 (App. 256a, 296a-97a). In deciding whether challenges to felony disenfranchisement laws are cognizable under Section 2, this Court should have before it the kind of record this case presents, demonstrating the extent to which such laws may "interact[ ] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives," just as Congress anticipated. *Gingles*, 478 U.S. at 47.

II. The Court Should Grant the Petition to Make Clear That the State Bears the Burden of Proving a Legitimate Purpose for Reenacting a Provision Originally Enacted with Discriminatory Intent.

If there had been no 1968 reenactment of Florida's policy of permanent felony disenfranchisement, the outcome of this challenge would be clear. Because the 1868 provision was enacted to discriminate against black citizens and has continuously had that effect, it would be unconstitutional under *Hunter*, 471 U.S. 222. The Eleventh Circuit concluded, however, that because *petitioners* had not demonstrated *racist intent* behind the 1968 reenactment, their constitutional challenge evaporated. *Johnson*, 405 F.3d at 1223-26 (App. 17a-25a). The majority deviated from both this Court's precedents and its own in placing the evidentiary burdens on petitioners and insisting that they prove racist intent anew in 1968, despite the provision's tainted origin and continuing discriminatory impact.

Reenactments have caused widespread confusion concerning the allocation and description of the burdens of proof on the crucial issue of discriminatory purpose. The lower courts approach haphazardly and answer inconsistently the questions of who bears the burdens of production and persuasion, and what evidence is sufficient, to prove that a reenactment has cleansed a law tainted by an original

unconstitutional purpose. The confusion is not unique to felony disenfranchisement cases. It arises in cases involving elections systems, redistricting, education reform, and the establishment of religion. In view of the pervasiveness of the issue and the disarray in the lower courts, this Court should grant review in this case to articulate a clear evidentiary rule to govern challenges to the reenactment of policies once adopted for discriminatory reasons.

A. This Court Has Followed a Consistent Approach to Assessing the Constitutionality of the Reenactment of Policies Tainted by an Impermissible Purpose.

This Court has already developed and consistently employed two straightforward evidentiary devices capable of resolving the confusion in the lower courts: a shift in both the burdens of production and persuasion, and careful consideration of the evidence regarding the purpose for a law's reenactment. The Court's decisions reveal that: (1) a state reenacting a policy tainted by an impermissible purpose bears the burden of proving that legitimate reasons motivated the reenactment, thus purging any taint; and (2) the state may carry this burden only by producing credible and contemporaneous evidence showing that the primary reason for reenacting the policy was valid.

Almost thirty years ago, this Court explained that state policies adopted with a discriminatory purpose are unconstitutional. *See Washington v. Davis*, 426 U.S. 229, 239-42 (1976). Shortly afterwards, in two companion cases, the Court made clear that if an improper purpose is shown to be a substantial or motivating factor in a policy's adoption, the burden shifts to the state to prove by a preponderance of the evidence that "the same decision would have resulted even had the impermissible purpose not been considered." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429

U.S. 252, 270 & n.21 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

Then, in *Hunter*, this Court recognized that the taint of improper purpose persists through time. The Court held Alabama's criminal disenfranchisement provision – adopted with discriminatory intent and yielding continuous discriminatory impact – to be unconstitutionally tainted eighty-four years after its passage. *Hunter*, 471 U.S. at 233. The Court reserved the possibility that a reenactment of the policy for legitimate reasons might render it constitutional. *Id.* Given proof of initial improper intent and continuing discriminatory impact, however, the Court repeated that the burden shifts to the state to establish the tainted policy's legitimacy. *Id.* at 228.

In *United States v. Fordice*, 505 U.S. 717 (1992), this Court addressed for the first time a state's attempt to purge, through a subsequent reenactment, the taint of a policy originally enacted with unconstitutional intent. The case concerned several policies maintained by Mississippi's historically white universities. One such policy conditioned admission on minimum standardized test scores that were just under the average for white students but double the average for black students. *Id.* at 734. The state had adopted the standards for the purpose of excluding blacks after James Meredith was admitted to the University of Mississippi under court order. *See Ayers v. Allain*, 914 F.2d 676, 679-80 (5th Cir. 1990) (en banc), *vacated sub nom. United States v. Fordice*, 505 U.S. 717 (1992); *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962). Three decades later, the policy continued to disqualify a disproportionate number of blacks from attending historically white universities. *Fordice*, 505 U.S. at 734. A class of black citizens sued under the Equal Protection Clause. Affirming the dismissal of their suit, the en banc Fifth Circuit focused not on the original intent of the policy in 1963, but instead on the state's intent in the mid-

1970s, when it readopted and amended the policy for the alleged purpose of addressing the under-preparation of incoming students. *Ayers*, 914 F.2d at 690. In the Fifth Circuit's view, the state's articulated reason for retaining the test standards in the 1970s purged their taint. *Id.*

This Court reversed, employing the evidentiary devices described above. All nine members of the Court recognized that because Mississippi's policies were "enacted originally to discriminate against black students," *Fordice*, 505 U.S. at 734, Mississippi bore the ultimate burden to prove proper justification for their readoption and continued implementation, *see id.* at 731, 739 (imposing on the state the burden to prove a clean break from prior intentional discrimination); *id.* at 744 (O'Connor, J., concurring) (same); *id.* at 746-47 (Thomas, J., concurring) (placing the burden to prove proper justification squarely on the state); *id.* at 758-59 (Scalia, J., concurring in the judgment in part and dissenting in part) (finding that in the face of policies once adopted with discriminatory intent, "the District Court should have required Mississippi to prove that its continued use of [standardized test] requirements does not have a racially exclusionary purpose and effect"). The Court was firm as well in its skeptical treatment of the state's asserted nondiscriminatory purpose. *See id.* at 734 (rejecting as a "midpassage justification" state evidence that test standards were maintained to address students' lack of preparedness for college); *id.* at 744 (O'Connor, J., concurring) ("[T]he courts below must carefully examine Mississippi's proffered justifications for maintaining a remnant of *de jure* segregation to ensure that such rationales do not merely mask the perpetuation of discriminatory practices.").

In his concurrence, Justice Thomas noted that the Court had, in effect, placed the burden of persuasion on the state:

> A challenged policy does not survive under the standard we announce today if it began during the prior *de jure* era, produces adverse impacts, and persists without sound educational justification. When each of these elements has been met, I believe, we are justified in not requiring proof of a present specific intent to discriminate. . . . And given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time, both because the State has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time. . . . Thus, if a policy remains in force, without adequate justification and despite tainted roots and segregative effect, it appears clear – clear enough to presume conclusively – that the State has failed to disprove discriminatory intent.

Id. at 746-47 (Thomas, J., concurring) (internal citations omitted). Justice Thomas thus explained the approach this Court has developed: given a policy initially tainted by and continuing to effectuate a state's discriminatory intent, the state bears the burden of persuading a factfinder that it had independent, legitimate reasons for retaining the policy at the time of its reenactment.

This Court most recently confronted the reenactment of a policy initially tainted by an impermissible purpose in *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005). *McCreary County* involved three decisions by county governments to install a display honoring the Ten Commandments. The first two decisions were undertaken with the impermissible intent to advance religion. *Id.* at 2738-39. While refusing to find that these "past actions forever taint any effort" to reinstall a Ten Commandments display, *id.* at 2741, the *McCreary County* Court shifted the

burdens of production and persuasion to the counties to justify the final display, *see id.* at 2739-40 & n.18 (reviewing and rejecting counties' stated purposes, and noting that the counties had not demonstrably "cast off" the earlier improper objective). The Court also held that the secular purpose the government proffers "has to be genuine, not a sham," as well as "preeminent" or "primary," *id.* at 2735-36 (internal quotations omitted). And it viewed the evidence offered through the eyes of an "objective observer . . . presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *Id.* at 2737.

The evidentiary standards applied in *Fordice* and *McCreary County* rest on unassailable legal principles. In the event of a reenactment of a tainted policy, the plaintiff has already carried the burdens of production and persuasion to prove the existence of a past unconstitutional motive, thereby establishing the taint. This proof overcomes the general presumption that government policies are constitutional. On the contrary, a tainted policy is unconstitutional, and it stays that way until the state wipes it clean. *See Hunter*, 471 U.S. at 233. Because it is the state's obligation to purge the taint, it only makes sense for the state to bear the evidentiary burdens in proving that it has done so. That is the logic of the burden shift imposed in *Arlington Heights*, 429 U.S. at 270 n.21, *Mt. Healthy*, 429 U.S. at 287, and *Hunter*, 471 U.S. at 228. *Fordice* and *McCreary County* add only that a reenactment, in itself, does not shift these burdens back to the plaintiff; a reenactment may indeed cure a policy's unconstitutionality, but the state must prove that it has done so. As to the content of this proof, government policies in general must be supported by a valid and rational purpose; so, too, must a reenactment. In proving that it retained or reenacted the policy for legitimate reasons, the state breaks the link with the policy's unconstitutional origin. Thus, the initial discriminatory purpose can no longer be viewed as a cause of the continuing discriminatory effects.

The instant case involves the intersection of two rights that demand the highest level of constitutional protection: the right to participate in the political process and to be free of race discrimination in doing so. Petitioners are entitled to enhanced evidentiary protections because the State has previously and purposefully infringed both rights.

B. The Lower Courts Are Not Following this Court's Approach, or Any Coherent Approach, in Assessing the Constitutionality of the Reenactment of Policies Tainted by an Impermissible Purpose.

Despite this Court's consistent application of these evidentiary rules, the lower courts are disregarding this precedent and reaching inconsistent results – in some cases, like this one, results at odds with this Court's decisions and inadequately protective of the constitutional rights at stake.

The Fourth Circuit recognized – and then avoided – the issue of the allocation of evidentiary burdens. In *Irby v. Virginia State Board of Elections*, 889 F.2d 1352 (4th Cir. 1989), the court confronted Virginia's decision to continue appointing rather than electing school board members. The appointive system was retained in 1901 – and reenacted in 1956 – in order to discriminate against black citizens. *Id.* at 1354. The policy was then reenacted on several subsequent occasions, with and without explanation. The Fourth Circuit declined to decide whether the finding of discriminatory intent in 1901 and 1956 "shifts to the defendants [the burden] to prove that the system is not currently being maintained for discriminatory purposes." *Id.* at 1355. Instead, the court assumed such a shift and held that the defendants had carried their burden. The *Irby* court expressed skepticism that the taint could be purged by a 1971 revision that made "dramatic (and racially progressive) changes [to its constitution] in other areas pertaining to education," but retained "the school

board selection provision . . . without change and with virtually no debate." *Id.* at 1356. Ultimately, however, the court held that the state defendants had "met their burden of rebutting the inference of discriminatory intent" by submitting evidence that the policy had been retained in 1984 on purely nondiscriminatory grounds. *Id.*

The Fifth Circuit's decisions reflect an unacknowledged internal conflict, first placing both evidentiary burdens as to legitimate intent on the challenger, and later reviewing with care the *state's* justification for a reenactment. In 1998, the Fifth Circuit held that, although Mississippi's criminal disenfranchisement provision was originally "motivated by a desire to discriminate against blacks," a reenactment "removed the discriminatory taint associated with the original version." *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998). Because the plaintiff had not proved impermissible intent at the reenactment stage, the court saw no constitutional wrong. Two years later, however, the same court looked to the state's evidence of its motives in retaining a policy. *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). When a redistricting plan allegedly adopted with racial motivation was later reenacted, the court inquired into "the state of mind of the reenacting body" and found that "the City had valid reasons to adhere to its prior borders distinct from the [purportedly tainted] grounds which led to their adoption." *Id.* at 520-21.

The Eleventh Circuit has changed its approach in the other direction, first placing both burdens of proof on the state and most recently, in this case, lifting the burdens from the state altogether and placing them on petitioners. In *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994), the Eleventh Circuit considered a challenge to Alabama's classification of its universities on racial lines, with more limited educational missions assigned to the historically black institutions. The plaintiffs there proved that this

system was traceable to *de jure* segregation. *Id.* at 1544. The court of appeals made clear that, under *Fordice*, "'the burden of proof [then] falls upon the *State*, and not the aggrieved plaintiffs,'" to establish a clear break from the prior unconstitutional policy. *Id.* at 1541 (quoting *Fordice*, 505 U.S. at 739 (alteration in original)). The court held that the state did not carry this burden by producing evidence of its reconsideration and reaffirmation of the classification system in 1974 and again in 1985, because the system remained, nevertheless, a "vestige of segregation," *id.* at 1542-45. *See Brown v. Bd. of Sch. Comm'rs*, 542 F. Supp. 1078, 1090 & n.11, 1105-06 (S.D. Ala. 1982) (invalidating Alabama's imposition of an at-large voting system motivated in 1876 by discriminatory intent and faulting the *state* for failing to show how a 1919 reenactment might have purged the taint), *aff'd*, 706 F.2d 1103 (11th Cir. 1983).

In contrast, the Eleventh Circuit's current rule allows a policy initially designed to advance an unconstitutional purpose to be cleansed if the state reenacts it through a multi-step process, with marginal textual modifications that leave the substance intact, and with complete silence as to its objective. *Johnson*, 405 F. 3d at 1220-22, 1224-25 (App. 11a-15a, 20a-23a). The court put petitioners to the task of proving a racist motive behind the reenactment in 1968, as if the law were newly minted and the hundred-year history of racial discrimination that produced it made no difference.

Such an unfair result is inconsistent with this Court's requirement that states show a definitive break with the racist origins of laws they decide to perpetuate despite their continuing discriminatory impact. Review by this Court is necessary to ensure, in this and an array of similar cases, that challenges to the reenactment of laws with odious origins and continuing discriminatory effects are resolved under the appropriate allocation and definition of the burdens of proof.

CONCLUSION

For these reasons, petitioners respectfully request that this Court grant this petition for a writ of certiorari to review the judgment of the Eleventh Circuit in this case.

Dated: Aug. 10, 2005

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IN THE

Supreme Court of the United States

THOMAS JOHNSON, *et al.*,

Petitioners,

v.

JEB BUSH, Governor of Florida, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DECIDED APRIL 12, 2005

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-14469

THOMAS JOHNSON, DERRICK ANDRE THOMAS, ERIC ROBINSON, ADAM HERNANDEZ, KATHRYN WILLIAMS-CARPENTER, JAU'DOHN HICKS, JOHN HANES, in their own right and as representatives of all ex-felon citizens of Florida,

Plaintiffs-Appellants,

OMALI YESHITELA,

Plaintiff,

v.

GOVERNOR OF THE STATE OF FLORIDA, JEB BUSH, Secretary of the State of Florida, KATHERINE HARRIS, CHARLIE CRIST, ROBERT MILLIGAN, WILLIAM NELSON, ROBERT CRAWFORD, THOMAS GALLAGHER, in their roles as members of the Clemency Board of Florida, BEVERLY HILL, Alachua County Election Supervisor, et al.,

Defendants-Appellees.

April 12, 2005, Decided
April 12, 2005, Filed

KRAVITCH, Circuit Judge:

I. Introduction

This case involves a Fourteenth Amendment Equal Protection Clause challenge and a Section 2 Voting Rights Act ("VRA") challenge to Florida's felon disenfranchisement law which provides that "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability."[1] Fla. Const. art. VI,

1. The full text of the provision states:

> No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

Fla. Const. art. VI, § 4 (1968).

A felon who has completed his sentence may apply for clemency to have his civil rights restored. Fla. Stat. § 940.05 (2003). The plaintiffs also allege that Florida's voting rights restoration scheme violates constitutional and statutory prohibitions against poll taxes. Access to the franchise cannot be made to depend on an individual's financial resources. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668, 16 L.Ed. 2d 169, 86 S. Ct. 1079 (1966). Under Florida's Rules of Executive Clemency, however, the right to vote can still be granted to felons who cannot afford to pay restitution. The requirement of a hearing is insufficient to support the plaintiffs' claim. Because Florida does not deny access to the restoration of the franchise based on ability to pay, we affirm the district court's grant of summary judgment in favor of the defendants on these claims. In doing so, we say nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax.

§ 4 (1968). The plaintiffs filed this class action on behalf of all Florida citizens who have been convicted of a felony and have completed all terms of their incarceration, probation, and parole but who are barred from voting under the state's felon disenfranchisement law.[2] The defendants are members of Florida's Clemency Board.[3]

II. Procedural History and Standard of Review

After cross motions for summary judgment, the district court granted summary judgment in favor of the defendants on all claims. A divided panel of this court reversed and remanded on both the Equal Protection and VRA claims. *Johnson v. Governor of State of Florida*, 353 F.3d 1287 (11th Cir. 2003), *vacated* 377 F.3d 1163. This court vacated the panel opinion and granted a rehearing en banc. *Johnson*, 377 F.3d at 1163-64. We now consider whether the district court erred in granting summary judgment in favor of the defendants on the plaintiffs' claims under the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act.

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2. Approximately seventy percent of the plaintiffs' class is white.

3. The Clemency Board is made up of the Governor of Florida and members of the Cabinet. The Clemency Board has the power to restore the civil rights of convicted felons, including the right to vote. *See* Fla. R. Exec. Clemency. The suit also named Florida's county supervisors of elections. Their participation has been abated pending determination of liability.

We review a district court's grant of summary judgment de novo, "viewing the record and drawing all reasonable inferences in the light most favorable to the non-moving party." *Patton v. Triad Guar. Ins. Corp.*, 277 F.3d 1294, 1296 (11th Cir. 2002). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

III. The Equal Protection Claim

The plaintiffs argue that Florida's felon disenfranchisement law violates the Equal Protection Clause, which prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The plaintiffs contend that racial animus motivated the adoption of Florida's criminal disenfranchisement provision in 1868 and this animus remains legally operative today, notwithstanding the fact that Florida altered and reenacted the provision in 1968.

A state's decision to permanently disenfranchise convicted felons does not, in itself, constitute an Equal Protection violation. *Richardson v. Ramirez*, 418 U.S. 24, 53-55, 94 S. Ct. 2655, 41 L.Ed.2d 551 (1974). The Supreme Court made this clear in *Richardson*, where it rejected a non-racial equal protection clause challenge to California's felon disenfranchisement law. 418 U.S. at 56, 94 S. Ct. 2655. In doing so, the Court relied on Section 2 of the Fourteenth Amendment, holding that it expressly permits states to

disenfranchise convicted felons.[4] The Court was persuaded that:

> [T]hose who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment.

Id. at 43. Of course, the Equal Protection Clause prohibits a state from using a facially neutral law to *intentionally* discriminate on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239-40, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976). This includes a criminal disenfranchisement law enacted with

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4. The full text of Section 2 states:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. U.S. CONST. amend. XIV, § 2.

the intent to deprive one racial group of its right to participate in the political process. *Hunter v. Underwood*, 471 U.S. 222, 233, 85 L.Ed.2d 222, 105 S.Ct. 1916 (1985). In light of this well-established precedent, the question here is whether the plaintiffs have alleged facts that, if true, would be sufficient to establish intentional discrimination in Florida's *current* disenfranchisement law.

1. Historical Background

Florida's policy of criminal disenfranchisement has a long history, tracing back well before the Civil War.[5] Florida's earliest Constitution, adopted in 1838, authorized the General Assembly to enact criminal disenfranchisement laws and in 1845, Florida's General Assembly enacted such a law.[6] Florida's 1861 and 1865

5. Indeed, throughout history, criminal disenfranchisement provisions have existed as a punitive device. *See* Harvard Law Review Association, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939, 1939-42 (2002). When the *Fourteenth Amendment* was ratified, twenty-nine of thirty-six states had some form of criminal disenfranchisement law. *See Richardson*, 418 U.S. at 48. Today, forty-eight states have some form of criminal disenfranchisement provision. Although Florida's felon disenfranchisement law may be among the most restrictive, Florida hardly stands alone in its long-standing use of these laws.

6. The 1838 Constitution provided that "[t]he general assembly shall have power to exclude from . . . the right of suffrage, all persons convicted of bribery, perjury, or other infamous crime." Fla. Const. art VI, § 4 (1838).

The 1845 provision stated:

> *Be it further enacted*, That every person who shall become a candidate for any of the foregoing offices, shall possess

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Constitutions also contained criminal disenfranchisement provisions.

There is no doubt that Florida's decision to adopt a criminal disenfranchisement law in these early Constitutions was based on a non-racial rationale. At that time, the right to vote was not extended to African-Americans, and, therefore, they could not have been the targets of any disenfranchisement law. The plaintiffs, however, point to *1868* as the critical date on which they allege Florida's disenfranchisement law became motivated by racial discrimination.

Because the plaintiffs' Equal Protection claim hinges on the 1868 criminal disenfranchisement provision, we must examine the historical context in which that provision was adopted. After the Civil War, the Reconstruction Act required Florida to ratify the Fourteenth Amendment and change its Constitution as a condition for readmittance to the Union.[7] In accordance with a *federally mandated* plan, the South was divided into military districts with Florida under the command of General John Pope. Under his supervision, both

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> the same qualification as that prescribed for a voter, before he shall be eligible to that office. And no person who shall hereafter be convicted of bribery, perjury, or other infamous crime, shall be entitled to the right of suffrage.

1845 Fla. Laws. Ch. 38, art. 2 § 3.

7. In *Richardson*, the Court briefly explained the process of how the southern states gained readmission to the Union following the Civil War. 418 U.S. at 48-52. The Court observed that many of the new *congressionally approved* state constitutions contained felon disenfranchisement provisions. *Id.*